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Utah Court of Appeals

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Recommended Citation

Brief of Appellant, *The State of Utah v. Shane Hochstetter*, No. 890537 (Utah Court of Appeals, 1989).
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UTAH COURT OF APPEALS
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DOCKET NO. 890537 IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, : BRIEF OF APPELLANT

Plaintiff/Respondent, :

v. :

SHANE HOCHSTETTER, : Case No. 890537-CA

Defendant/Appellant. : Priority No. 2

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, THE STATE OF
UTAH, THE HONORABLE MICHAEL R. MURPHY, JUDGE
PRESIDING.

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FILED

DEC 8 1989

COURT OF APPEALS

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, : BRIEF OF APPELLANT
Plaintiff/Respondent, :
v. :
SHANE HOCHSTETTER, : Case No. 890537-CA
Defendant/Appellant. :

STATEMENT OF JURISDICTION

This appeal is made pursuant to Title 77, Part 35, Section 26 of the Utah Code (1953 as amended) and Rule 3(a) of the Rules of the Utah Court of Appeals. This court has appellate jurisdiction in this case pursuant to Title 78, Part 2a Section 3(2) of the Utah Code (1953 as amended).

NATURE OF THE PROCEEDINGS

This is an appeal from a final judgement of conviction for the offenses of Aggravated Robbery and Falsely Signing a Financial Transaction Card Sales Slip entered in the Third Judicial District Court, in and for Salt Lake County, the Honorable Michael R. Murphy, Judge presiding.

STATEMENT OF ISSUES PRESENTED FOR APPEAL

Was appellant denied his right to effective of assistance of counsel by trial counsel's failure to request or submit a cautionary instructon on eyewitness identification?

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the of nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Article I, Section 7 of the Constitution of Utah:

No person shall be deprived of life, liberty or property, without due process of law.

STATEMENT OF THE CASE

The appellant, Shane Hochstetter, was charged in a two count information with the offenses of Aggravated Robbery, a violation of Utah Code Annotated §76-6-302 (1953 as amended) and Falsely Signing a Financial Transaction Card Sales Slip a violation of Utah Code Annotated §76-6-506.1 (1953 as amended). (R. 6) Appellant was convicted as charged in a jury trial. (R. 27, 28) He was sentenced to concurrent terms of five years to life and one to fifteen years at the Utah State Prison. (R. 63,64).

STATEMENT OF THE FACTS

At trial, Ola Brattegard testified that in the early morning hours of May 21, 1988, he and a friend, Marie Sorieno,

were taking a walk on First Avenue in Salt Lake City. (Tr. 51) The couple was stopped by three males whom he had never seen before. In court, Brattegard identified one of the males as the appellant. (Tr. 53) Brattegard testified that appellant brandished a handgun and threatened to kill him unless he gave them all his money. (Tr. 53, 55) The witness originally believed that a knife had been brandished, but then realized that it was a small caliber handgun. (Tr. 55) Brattegard gave the robbers his coat and the three ran away. (Tr. 56) The coat contained Brattegard's wallet, money, telephone credit card and bank credit card. A Loris watch and an identification card for Brattegard from the Norwegian army were also in the coat. (Tr. 57)

The witness described the gunman as about six feet two inches tall with thin long hair. He stated that the gunman was wearing a black leather jacket and a yellow bandanna. (Tr. 61) Brattegard had previously described the gunman as being five feet nine inches tall, one hundred fifty pounds and having medium length hair. (Tr. 122, 125) The robbery took place at two o'clock in the morning on a street that had no street lights. (Tr. 51, 61-62)

Annette Scott testified that she worked at a gift shop at Fashion Place Mall in Murray, Utah. (Tr. 68) She identified a credit card transaction slip made out to Ola Brattegard for the purchase of a bracelet on the morning of May 21, 1988. (Tr. 69) Brattegard has previously testified that it was not his signature on that transaction slip. (Tr. 58) The address written on the

slip was "180 P St" in Salt Lake City. (Tr. 69) Ms. Scott was not able to give a description of the person who purchased the bracelet and stated that she was not positive if she had ever seen appellant other than in court. (Tr. 74)

Mike John Casner identified a pawn card from Main Street Pawn. (Tr. 77) Mr. Casner did not specifically remember the transaction. He stated that he is required to get a picture identification and take a thumb print on the card. (Tr. 77) The card identified by Mr. Casner contained appellant's name and reflected that a California identification was used. (Tr. 81) The card further reflected that a gold bracelet and Loris watch had been pawned on the afternoon of May 21, 1988. (Tr. 75, 78)

Fifteen year old Misty Mortenson testified that she had met appellant through some friends. (Tr. 82) She indicated that in May of 1988 the appellant, Jay Kane and others were at her residence on 180 P Street in Salt Lake City. (Tr. 82, 84, 90) She stated that at that time Jay Kane and appellant talked about robbing a Norwegian army sergeant. (Tr. 85, 93) Heather Smith testified that she was with the appellant and others at the Speedway Cafe in Ogden, Utah. (Tr. 96) They were there to listen to a band called the "Pagan Babies." (Tr. 98) She stated that during the evening appellant and others talked about having robbed a Norwegian army sergeant. (Tr. 96) A wrist watch that was supposed to have been taken in the robbery was passed around. (Tr. 98) Ms. Smith initially indicated this occurred in June, 1988. (Tr. 96) She later stated that she could not recall if the conversation occurred before or after May 21, 1988. (Tr. 99)

Ms. Smith also testified that a friend named David has called her on a stolen telephone credit card. (Tr. 97)

A crime laboratory technician, Steven Rowley, testified that appellant's thumbprint was on the pawn shop card. (Tr. 107) He also testified that the same person who filled out appellant's application for a California driver's license wrote the phrase "180 P" on the credit card slip from the gift shop at Fashion Place Mall. (Tr. 111) He testified that the two documents had thirteen common letters. (Tr. 114) Sargeant Rowley stated "I determined that approximately 10 to 12 of those [letters] were written almost the same." (Tr. 114)

Appellant testified in his own behalf. He denied participating in the robbery. (Tr. 133) He did admit that he had pawned a bracelet and a watch. (Tr. 134) Appellant testified that the items were pawned to buy gas. He received the bracelet from an individual named Jay Kane and the watch from an individual named Eric. (Tr. 134) Appellant testified that he was with Heather Smith at a "Pagan Babies" performance on May 17, 1988. (Tr. 132) Appellant denied that he had written "180 P" on the credit card slip. (Tr. 137) He also testified that his mother had done most of the writing on his driver's license application. (Tr. 145) Appellant further denied that he had made statements about the robbery to either Heather Smith or Misty Mortenson. (Tr. 143-144) Appellant testified that he was present when Jay Kane and two other males named Eric and Brook talked to Misty Mortenson about robbing a Norwegian army sergeant. (Tr. 131)

Trial counsel for appellant did not submit any jury instructions. The trial court asked counsel, sua sponte, if he desired an eyewitness identification instruction. (Tr. 154) Counsel responded, "I have no objection to going without it." The court then asked, "You do not want one?" and counsel responded "No." (Tr. 155)¹ With respect to the robbery count, trial counsel raised an identification defense. In his opening statement, he discussed discrepancies between the appellant's physical appearance and Brattegard's initial description of the gunman. (Tr. 188-119) In closing, counsel also argued the problems with the eyewitness identification. (Tr. 169-170)

SUMMARY OF ARGUMENT

The failure to submit a cautionary instruction on eyewitness identification constituted deficient performance by trial counsel which was not an exercise of reasonable professional judgment. There was no conceivable tactical advantage in refusing to request the instruction. Further, the failure to request the instruction was prejudicial to appellant's case because there was a reasonable probability that the result would have been different had that instruction been given.

¹ The instruction that the trial court referred to was not made part of the record. However, it is fairly obvious that the court was inquiring about the preferred instruction described in State v. Long, 721 P.2d 483 (Ut. 1986), that instruction is attached in the Addendum.

ARGUMENT

APPELLANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE A CAUTIONARY JURY INSTRUCTION ON EYEWITNESS IDENTIFICATION WAS NOT SUBMITTED BY TRIAL COUNSEL.

The Sixth Amendment to the United States Constitution, as applied to the States guarantees a criminal defendant the right to counsel. Gideon v. Wainwright, 372 U.S. 335 (1963). In Strickland v. Washington, 446 U.S. 668 (1984), the Court held that the Sixth Amendment also entitled criminal defendants to effective assistance of counsel. In that case, the Court established a two prong test to determine if a defendant has been denied that right. First, there must be a showing that counsel's performance was deficient. Second, there must be a showing of prejudice. The deficiency in performance cannot be presumed from counsel's inexperience, a lack of time to prepare, or the complexity of the proceeding. United States v. Cronin, 466 U.S. 648 (1984). Under the ruling in Strickland, prejudice is shown if the result of the trial probably would have been different. This must be based on a review of all the evidence. The Court noted that the ultimate focus must be on the fundamental fairness of the proceeding.

All of the recent decisions addressing the issue of ineffective assistance of counsel from this court and the Supreme Court of Utah have applied the Strickland test. With respect to the requirement of the showing of a deficient performance, specific acts or omissions must be alleged. There must be a showing that such acts were not the result of reasonable professional judgment. State v. Frame, 723 P.2d 401 (Ut. 1986).

If a lawyer exercises judgement in his choice of trial strategy or tactics that does not produce a favorable result there is not necessarily ineffective assistance of counsel. State v. Colonna, 766 P.2d 1062 (Ut. 1988). In Colonna, the court indicated that deference will be given to counsel's trial decisions. The court went on to state, "Generally, an attorney's performance will be held ineffective only when there is no tactical or strategic justification for his conduct at the trial" 766 P.2d at 1066.

In State v. Moritzsky, 771 P.2d 688 (Ut. App. 1989) this court discussed the function of an appellate court in addressing the prejudice requirement of the Strickland standard. The court stated:

We must...determine if counsel's deficient performance undermines our confidence in the verdict against the defendant. [citation omitted] Specifically, we must decide if a reasonable probability exists that the jury's verdict would have been more favorable to defendant...

771 P.2d at 692. The reviewing court may first assess the issue of prejudice in disposing of ineffective counsel claims. Strickland v. Washington, supra; Bundy v. DeLand, 763 P.2d 803 (Ut. 1988)

In this case the specific act constituting ineffective assistance of counsel relates to the failure to have the jury given a cautionary instruction on eyewitness identification. Before an ineffective counsel claim may succeed on a jury instruction issue, the appellant must show that he was entitled to the instruction. State v. Speer, 750 P.2d 186 (Ut. 1988). In State v. Long, supra, the court found prejudicial error in the

refusal to give a cautionary instruction on the issue of eyewitnesses identification. In that case the court discussed in detail the serious problems with eyewitnesses identification evidence. The court rejected a corroboration requirement as a solution to the problems with eyewitness identification. The court then stated:

...we do consider ourselves compelled by the overwhelming weight of the empirical research to take steps to alleviate the difficulties inherent in any use of eyewitness identification testimony.

We are convinced that, at a minimum, additional judicial guidance to the jury in evaluating such testimony is warranted. We therefore today abandon our discretionary approach to cautionary jury instructions and direct that in cases tried from this date forward, trial courts shall give such an instruction whenever eyewitness identification is a central issue in a case and such an instruction is requested by the defense. Given the great weight jurors are likely to give eyewitness testimony, and the deep and generally unperceived flaws in it, to convict a defendant on such evidence without advising the jury of the factors that should be considered in evaluating it could well deny the defendant due process of law under article I, section 7 of the Utah Constitution.

721 P.2d at 490. If properly requested, the trial court in this case would have been required to give this cautionary instruction. In fact, the trial court suggested to counsel that such an instruction be given. (Tr. 154)

With respect to the first prong of the Strickland test, trial counsel's rejection of the eyewitness instruction clearly constituted a deficient performance that fell below an objective standard of reasonable professional judgment. In this regard,

this case is very similar to the situation in State v. Moritzsky, supra. In Moritzsky, the defendant had been convicted of aggravated assault. He had claimed defense of habitation. The evidence was in conflict. However, the defendant's testimony indicated that the victim had come into his residence before defendant shot at him. The jury instruction submitted by defense counsel failed to incorporate a presumption that the defendant acted reasonably if the victim's entry was made under circumstances specified in Utah Code Annotated §76-2-405(2) (1953 as amended). The court in Moritzsky found that the defendant would have been entitled to have the jury instructed on the presumption if it had been properly requested. The court held that there was no conceivable tactical basis for requesting a defense of habitation instruction without the presumption. The conviction in Moritzsky was reversed and a new trial ordered.

In the instant case, the defense to the aggravated robbery charge was that Ola Brattegard was mistaken in his identification of appellant. The suggested instruction from State v. Long, supra,² details the various factors that may affect an eyewitness identification. Several of those factors were present here: the lighting, the time of day, the stress of the situation, prior identifications, the circumstances surrounding the identification and discrepancies in the description of appellant and the robber. The purpose of this instruction is to alleviate the problems inherent in eyewitness

² The instruction is reproduced in its entirety in the Addendum.

identification evidence. Consequently, there can be no conceivable tactical advantage in not requesting such an instruction.

The final issue to be addressed is that of prejudice. If this case was based solely on eyewitness identification evidence, there would be no question as to the prejudice in failing to give the cautionary instruction. State v. Long, supra. In addition to the eyewitness identification evidence there was evidence that the appellant made statements about the robbery. The state also introduced opinion evidence on the handwriting analysis of the credit card slip and the documents from the pawn shop. However, appellant did testify and deny that he had committed the robbery. He also testified that he did not make the statements, nor did he use the victim's credit card on the day following the robbery. Thus the credibility of this additional evidence was put at issue.

There were serious problems with the credibility of Misty Mortenson and Heather Smith. Misty Mortenson testified that both appellant and Jay Kane were talking about the robbery. She was unable to describe who said what in the conversation. (Tr. 92) Appellant testified that he was present when the conversation took place, but it was Jay Kane and two others who discussed committing the robbery. (Tr. 1331) Heather Smith described talking to appellant about the robbery at a "Pagan Babies" performance. (Tr. 98) She also testified that she and others saw the watch taken from the Norwegian sergeant at the time of the robbery. (Tr. 97) She did not know if that

conversation took place before or after May 21, 1988. Appellant testified that he attended the "Pagan Babies" performance on May 17, 1988. (Tr. 132) Smith's testimony was inconsistent with the documentary evidence from the pawn shop indicating that the watch was pawned at 2:30 p.m. on the day following the robbery. (Tr. 76) Finally, appellant testified that the two women were willing to implicate him in the robbery to protect their boyfriends. (Tr. 144)

With respect to the handwriting evidence, Steven Rowley testified that he compared the writing on the credit card slip and the writing on appellant's driver's license application. His opinion was that the person who wrote "180 P" on the credit card slip also filled out the driver's license application. (Tr. 111-112) This was based on ten to twelve letters that were written almost the same. (Tr. 114) Appellant testified that he did not fill out the credit card slip, nor did he fill out the majority of the driver's license application. (Tr. 135-136) Interestingly, there was no comparison of the handwriting on the credit card slip and the pawn slip. Appellant admitted pawning the watch and bracelet. (Tr. 134) Appellant testified that he received the watch from Jay Kane and the gold bracelet from an individual named Eric. (Tr. 134) Eric was one of the people who was present at Misty Mortenson's residence when the robbery was discussed. (Tr. 131)

As can be seen, serious issues relating to the credibility of the evidence had to be decided by the jury. Because of these credibility problems the evidence other than the

eyewitness identification was of questionable reliability. Thus, the eyewitness evidence would be left to stand on its own. Consequently, there is a reasonable probability that the result of the trial would have been different had the requested instruction on eyewitness identification been given.

CONCLUSION

Trial counsel's failure to allow the court to give a cautionary instruction to the jury on eyewitness identification constituted a deficient performance. The failure to give that instruction was prejudicial to appellant's case. Appellant's conviction should be reversed and the case remanded to the district court for a new trial.

DATED this ____ day of December, 1989.

G. FRED METOS
Attorney for Defendant/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of December, 1989, a true and correct copy of the foregoing was MAILED/DELIVERED to the Utah State Attorney General's office, at 236 State Capitol Building, Salt Lake City, Utah, 84114.

ADDENDUM

The proposed jury instruction from State v. Long,
supra:

One of the most important questions [The only important question] in this case is the identification of the defendant as the person who committed the crime. The prosecution has the burden of proving beyond a reasonable doubt, not only that the crime was committed but also that the defendant was the person who committed the crime. If, after considering the evidence you have heard from both sides, you are not convinced beyond a reasonable doubt that the defendant is the person who committed the crime, you must find the defendant not guilty.

The identification testimony that you have heard was an expression of belief or impression by the witness. To find the defendant not guilty, you need not believe that the identification witness was insincere, but merely that [the witness] was mistaken in his [her] belief or impression.

Many factors affect the accuracy of identification. In considering whether the prosecution has proved beyond a reasonable doubt that the defendant is the person who committed the crime, you should consider the following:

1) Did the witness have an adequate opportunity to observe the criminal actor?

In answering this question, you should consider:

- a) the length of time the witness observed the actor;
- b) the distance between the witness and the actor;
- c) the extent to which the actor's features were visible and undistinguished;
- d) the light or lack of light at the place and time of observation;
- e) the presence [or] absence of distracting noises or activity during the observation;
- f) any other circumstances affecting the witnesses' opportunity to observe the person committing the crime;

2) Did the witness have the capacity to observe the person committing the crime?

In answering this question, you should consider whether the witness' capacity was impaired by:

- a) stress or fright at the time of observation;
- b) personal motivations, biases or prejudices;
- c) uncorrected visual defects;
- d) fatigue or injury;
- e) drugs or alcohol;

[You should also consider whether the witness is of a different race than the criminal actor. Identification by a person of a different race may be less reliable than identification by a person of the same race.]

3) Was the witness sufficiently attentive to the criminal actor at the time of the crime?

In answering this question, you should consider whether the witness knew that a crime was taking place during the time he [she] observed the actor. Even if the witness had adequate opportunity and capacity to observe the criminal actor, he [she] may not have done so unless he [she] was aware that a crime was being committed.

4) Was the witness' identification of the defendant completely the product of his [her] own memory?

In answering this question, you should consider:

- a) the length of time that passed between the witness' original observation and his [her] identification of the defendant;
- b) the witnesss' [mental] capacity and state of mind and the time of the identifications;
- c) the witness' exposure to opinions, descriptions or identifications given by other witness, to photographs or newspaper accounts, or to any other information or influence that may have affected the independence of his [her] identification;
- d) any instances when the witness, or any eyewitness to the crime, failed to identify the defendant;
- e) any instances when the witness, or any eyewitness to the crime, gave a description of the actor that is inconsistent with the defendant's appearance;
- f) the circumstances under which the defendant was presented to the witness for identification.

[You may take into account that an identification made by picking the defendant from a group of similar individuals is generally more reliable than an identification made from the defendant being presented to the witness.]

[You may also take in to account that identifications made from seeing the person are generally more reliable than identifications made from a photograph.]

Again I emphasize that the burden of proving that the defendant is the person who committed the crime is on the prosecution. If, after considering the evidence you have heard from the prosecution and from the defense, and after evaluting the eyewitness testimony in light of the considerations listed above, you have a reasonable doubt about whether the defendant is the person who committed the crime, you must find him not guilty.